Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6721

BURLINGTON NORTHERN INC., et al.,

Appellants,

vs.

STERLING COLORADO BEEF COMPANY,

Appellee.

On Appeal from the United States District Court for the District of Colorado

JURISDICTIONAL STATEMENT

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Appellee.

On Appeal from the United States District Court for the District of Colorado

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JURISDICTIONAL STATEMENT

Appellants, Burlington Northern Inc., et al., appeal from an order of a three-judge district court which reversed and remanded an order of the Interstate Commerce Commission in Docket 35021, reported at 339 I.C.C. 530 (1971).

OPINIONS BELOW

The opinion and order of the District Court for the District of Colorado is not yet reported. The opinion of Division 2 of the Interstate Commerce Commission is reported at 339 I.C.C. 530 (1971). The recommended report and order of the Commission's Hearing Examiner was unreported. Copies of all these opinions are set forth separately in the appendix.

JURISDICTION

The order here sought to be reviewed was entered in a suit initiated by appellee with District Court for the District of Colorado on February 25, 1974, pursuant to 28 U.S.C. Sec. 1336 to annul, enjoin and set aside the Commission order reported at 339 I.C.C. 530. A three-judge court was convened as then required by 28 U.S.C. Sec. 2325. The judgment of the district court was entered on August 17, 1976, remanding the decision of the Interstate Commerce Commission in accordance with the views expressed therein. (App. A. pp. 1a-7a).

Two notices of appeal were filed in the district court. The first notice was filed by these appellants on August 27, 1976 and the second notice by the Interstate Commerce Commission on October 15, 1976. (App. D. pp. 37a-40a). Because of the double filing there is some confusion by counsel regarding the provisions of Supreme Court Rule 13(1) that appeals be docketed "sixty days from the filing of the notice of appeal." It is clear that the jurisdiction of this court attached upon the undisputed timely filing of the notices of appeal.

Therefore, any mistake by counsel in the time the docketing of this appeal is not jurisdictional and may be waived. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86 (1947). Since it is clear that no party has been prejudiced, appellants formally and respectfully request that any nonjurisdictional defect be waived.

Jurisdiction to review the decision of the district court by direct appeal is conferred on this court by 28 U.S.C. Sections 1253 and 2101(b). See, e.g., *American Commercial Lines v. L&N R. Co.*, 392 U.S. 571 (1968).

QUESTIONS PRESENTED

1. Whether the decision of the court below is in conflict with the decision of this court in *Great Northern Railway Co. v. Sullivan*, 294 U.S. 458 (1935).

2. Whether the court below applied a clearly erroneous scope of review function in its judicial review of administrative agency action.

3. Whether the court below erred in directing the administrative agency to depart from its prior decisions without justification.

STATUTES INVOLVED

The statutory provision pertinent to this appeal is the scope of review section of the Administrative Procedure Act contained in 5 U.S.C. Section 706. It provides as follows:

> "To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

STATEMENT

By a complaint filed with the Interstate Commerce Commission in 1968,[1] the Sterling Colorado Beef Company elected to seek reparations or money damages through the administrative agency process, rather than by a suit filed in a U. S. District Court.[2] During the involved period, Sterling was shipping fresh meats via rail piggyback or trailer on flat car (TOFC) from Sterling, Colorado to various destination markets. Sterling's meat shipments were primarily destined to the Chicago and New York markets. Two separate and distinct rail rates were assailed by Sterling in their complaint filed with the Commission. The shipment which terminated at Chicago moved on the local western rate. The rates on shipments to the New York or eastern markets consisted of single factor through rates and lower combination through rates, consisting of western and eastern factors.[3]

The Commission directed that Sterling's complaint be handled under its modified procedure regulations. This procedure involves the submission of evidentiary material and argument in written form with no oral hearings for purposes of cross-examination. Sterling's evidence before the Commission was directed solely to the alleged unreasonableness of the western factor rate to Chicago and no evidence was submitted in regard to the eastern factor rates.

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[1] Assigned Docket No. 35021 by the Commission.

[2] Section 9 of the Interstate Commerce Act (49 U.S.C. Sec. 9) provides for such an election.

[3] Although Sterling assailed the rates to the New York markets they did not name the eastern railroads as party defendants in their complaint before the Commission.

The matter was subsequently assigned to a Commission Hearing Examiner[4] for timely disposition and in his initial decision he ordered the award of reparations to Sterling on its shipments terminating at Chicago based on a finding of unreasonableness of the western factor rate. However, reparations were denied on shipments to the eastern markets based on Sterling's failure to sustain its evidentiary burden of proving that the through rates were unreasonable. (App. C. p. 31a) With exceptions not here relevant this initial decision was affirmed through the Commission appellate process, culminating in the decision of Division 2 of the Commission on July 9, 1971, reported at 339 I.C.C. 530 (App. B. p. 15a).

Several years later, in 1974, a judicial review action was instituted by Sterling Colorado Beef Company in the U. S. District Court for the District of Colorado seeking an order directing the Commission to require the defendant railroads to pay reparations on those shipments which terminated at the New York or eastern markets which the Commission had considered in Docket 35021. On August 17, 1976, judgment was entered by the three-judge court, reversing and remanding the proceedings to the Commission based on its conclusion that the denial of the reparations claimed by Sterling Beef on shipments to points east of Chicago was an error of law. (App. A. p. 5a).

In the court below, appellants argued that the Commission was simply adhering to its long settled principle that a shipper-complainant cannot substantiate its burden of proving a through combination rate unreasonable by evidence directed to only one of the fac-

[4] This descriptive title has been subsequently changed to Administrative Law Judge.

tors and that this principle had been specifically upheld by this court, when it had an opportunity to consider this proposition.[5]

The court rejected this argument finding that it need not attempt any definitive interpretation of the *Great Northern* decision. Instead, the court proceeded to reweigh the Commission evidence and substituted its conclusion for that of the Commission in holding that the plaintiff did sustain economic injury on all of its shipments to the east, regardless of the points of termination. (App. A. p. 4a).

[5] *Great Northern Railway v. Sullivan*, 294 U.S. 458 (1935).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this case are of critical importance to all railroads and shippers in the United States. The question arises consistently in cases before the Interstate Commerce Commission and involves monetary sums of substantial magnitude.[6]

The holding of the court below conflicts with the decision of this court in the *Great Northern* case and is squarely at odds with over sixty years of consistent interpretation of the Interstate Commerce Act by the Commission regarding the evidentiary standard necessary to support reparation awards.

Although the lower court reversed and remanded on the grounds that the Commission committed an error of law, the court failed to cite any such controling law in support of its unwarranted conclusion. Indeed, as noted above, applicable judicial and administrative precedents are consistently and uniformly to the contrary.

1. In *Great Northern Railway v. Sullivan*, 294 U.S. 458, 462-463 this Court held that reparation awards in Commission proceedings must be justified by specific findings by the agency that the amount of the total charge was unjust and unreasonable. In the *Great Northern* case the issue was whether a shipper could prevail in a reparation action based on a showing that

[6] The instant case is just one of many such cases decided annually by the Commission and it is estimated that in excess of a half million dollars is involved in just this one case. This case, therefore, is of great importance to appellants not only because of the particular situation involved but also because of its precedential importance in other litigation involving reparation awards.

one of the factors in a proportional or combination through rate was unreasonable. The Court clearly held that such a showing was inadequate to justify a Commission order for reparations without a specific finding that the total charge was excessive.

Predating the *Great Northern* decision this legal principle had been consistently applied by the Commission in reparation proceedings since 1917.[7] Since the *Great Northern* decision and in accord therewith the Commission has continued to apply this legal principle in reparation cases.[8]

In this case, the shipper offered no evidence before the Commission as to the alleged unreasonableness of the eastern factor or the combination through rate. Therefore, the Commission necessarily could not and did not make a finding concerning the unreasonableness of the eastern combination factor or of the combination through rate. Under these factual circumstances this Court held in the *Great Northern* case that the charges must be deemed to be just and reasonable. 294 U.S. 458, 461.

Although the lower court appeared to recognize this principle in its opinion (App. A. p. 32), it clearly misconstrued the effect of the *Great Northern* decision by its finding that the combination through rate was unjust and unreasonable. The lower court in attempting to distinguish the *Great Northern* case from the instant case, stated:

[7] See, e.g.—*Cairo Board of Trade v. CCC&St. L. Ry. Co.*, 46 I.C.C. 343, 350 (1917); *G. W. Zaring & Co. v. Florida East Coast Railway Co.*, 153 I.C.C. 647, 650 (1929); *Fraser-Smith Co. v. Grand Trunk Western Ry. Co.*, 185 I.C.C. 57, 58 (1937).

[8] See, e.g.—*United States v. Beaumont SL&W Ry. Co.*, 301 I.C.C. 231 (1957); *United States of America v. Central of Georgia Ry. Co., et al.*, 332 I.C.C. 33, 36 (1967).

> "The combination rates involved in *Great Northern*, however, differed from those here in that rather than combining independently published local rates, the combination was of proportionals, which were used only to divide the through rate between participating railroads." (App. A. p. 3a).

Appellee had argued below that the *Great Northern* case was distinguishable because proportional rather than combination rates were involved. This is clearly a distinction without a difference since the Commission has consistently held that factors making up the through rate whether proportional or combination, merely represented division of such through rates among participating carriers.[9] The validity of this principle cannot be effected by the mere mechanics of tariff publication.

The lower court clearly erred in its opinion by indicating that it need not attempt any definitive interpretation of the *Great Northern* case in reaching its decision. This is further illustrated by the specific holding in the *Great Northern* case that a through rate may be reasonable although one or more of the factors of which it is composed may be unreasonable. The lower court erred in holding that when one factor of a through rate is found unreasonable, the measure of damages for the through rate is the excess of such factor over an assumed reasonable factor. This clearly conflicts with the specific holding of this court in the *Great Northern* case which requires a showing as to the unreasonableness of the through rate, which was absent from the shipper's showing before the Commission.

Therefore, the decision of the lower court should be summarily reversed and vacated because of its clear conflict with this court's decision in the *Great Northern* case.

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[9] *Morrell v. NYC*, 104 I.C.C. 104, 128.

2. The lower court has applied a clearly erroneous judicial review standard in reaching its conclusion. The scope of review function by a reviewing court in considering administrative agency decisions requires reversal only when the agency action is unsupported by substantial evidence. Administrative Procedure Act, 5 U.S.C. Section 706(2(E)); *Illinois Central R. Co. v. Norfolk and Western R. Co.*, 385 U.S. 57, 65-66 (1966).

Under the Interstate Commerce Act, a shipper-complainant has the burden of proving that tariff charges are unjust and unreasonable in order to support a reparation award. In this case, the Commission made an ultimate finding that the complainant had not met its burden of showing the total through charges to be unjust and reasonable. (App. B. p. 15a). This agency finding cannot be found to be unsupported by substantial evidence when the shipper's only evidentiary showing related to the alleged unreasonableness of one of the two factors involved in the combination through rate. One of the defects in the opinion of the lower court was its reweighing of the agency testimony in setting aside the negative burden of proof finding by the agency. The lower court would establish a principle that the agency may not make a negative burden of proof finding unless the carrier defendants present substantial evidence to support the contrary conclusion. The effect of the decision below is clearly erroneous in transferring the burden of proof to carrier defendants. It is clear that a negative finding as to lack of substantial evidence to show rates are unjust and unreasonable need not be supported by substantial evidence that rates are just and reasonable.

For the lower court to set aside a negative burden of proof finding is a clear indication that it simply substituted its judgment for that of the Commission as to

whether or not the burden had been met. It is not within the power of the lower court to affirmatively hold that a complainant-shipper has met its burden of proof when the Commission has specifically held to the contrary. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 618-619 (1966).

The lower court erred by substituting its own affirmative finding that the shipper had sustained economic injury on shipments to the eastern markets. This conclusion of the lower court ignored the negative burden of proof finding by the agency. The lower court in so doing exceeded its scope of review function under the Administrative Procedure Act. Authority to set aside agency action is manifestly not authority to make new and contrary findings and to decide on the merits an issue entrusted to the administrative agency for determination.

It is appellants' position that the lower court decision has applied erroneous judicial review standards under the Administrative Procedure Act and, therefore, that decision should be summarily reversed and vacated.

3. The lower court also erred in abrogating to itself the right to direct an administrative agency to depart from its prior decisions. As noted earlier, the decision of the Commission in this case was consistent with a long series of Commission precedents in reparation proceedings, as well as the decision of this Court in the *Great Northern* case.

When an administrative agency has established a consistent pattern of decisions over an extended period of time, it is reasonable to assume that such legal principles embodied in those decisions will remain in force. This is reinforced when the legal principle established in such series of agency decisions has been specifically

sanctioned by a decision of this court. If an agency is to depart from its prior decisions, such departures must be clearly justified and articulated. Recently, this court remanded an action to the Interstate Commerce Commission and required the agency to justify its departure from its prior decisions. *Atchison Topeka & Santa Fe Railway Co., et al. v. Wichita Board of Trade*, 412 U.S. 800 (1973). If it is error for an administrative agency to depart from its prior decisions without justification, it cannot be gainsaid that the attempt of a reviewing court to require an agency to do so, as in this case, is clearly erroneous. The only possible rationale for such excess of zeal by a reviewing court would be a finding that such legal principle is purely arbitrary or capricious. There is no such finding by the lower court in this case. Indeed, the legal principle at issue here appears to be legally and factually sound.

CONCLUSION

Because of the conflict between the lower court decision and the decision of this court in the *Great Northern* case and because the lower court exercised an improper judicial review standard, this Court should summarily vacate and reverse the lower court's opinion or, in the alternative, note probable jurisdiction since the issues here presented are substantial.

Respectfully submitted,

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Appellee.

On Appeal from the United States District Court for the District of Colorado

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE STERLING COLORADO BEEF COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN, INC., et al.,

Defendants.

Civil Action No. 74-A-179

THE STERLING COLORADO BEEF COMPANY,

Plaintiff

v.

BURLINGTON NORTHERN, INC., et al.,

Defendants.

Civil Action No. 74-M-221

MEMORANDUM OPINION AND ORDER

There are two questions to be answered by this three-judge court in these consolidated proceedings for judicial review of decisions of the Interstate Commerce Commission pursuant to statute.

While these questions have a common factual basis, they arise through separate records of administrative proceedings and a different focus with respect to the standard of judicial review.

I.C.C. Docket No. 35021 was a complaint by Sterling Colorado Beef Company that the actions of the railroads in establishing group rates for the shipments of fresh meat and meat by-products by trailer on flatcar (TOFC) carloads was an unjust and unreasonable charge in violation of 49 U.S.C. § 1(5) and resulted in undue prejudice or preference in violation of 49 U.S.C. § 3(1). More particularly, the plaintiff complained that it was placed in a competitive disadvantage with other shippers in the group. The specific grouping involved was that shipments from Sterling, Colorado, Denver, Colorado, Greeley Junction and Pueblo, Colorado, all paid the same rate to Chicago even though Sterling is approximately 140 miles closer to Chicago than the farthest of the other grouped points.

The result of this complaint was a long and tortured maze of administrative proceedings, with appeals, reconsiderations and adjustments. The final result was a decision that the group rate was "relatively unreasonable" as applied to the plaintiff and a correction was ordered. Additionally, the plaintiff was awarded reparations for shipments from Sterling to Chicago; but, it was denied any payment for shipments through Chicago to termination points east of that city. Those shipments were made on combination rates whereby two independently published charges, the Sterling-Chicago factor and the Chicago-eastern destinations factor, were added to form the combination through rate.

The Commission held that the failure to direct specific proof at the reasonableness of the rates on factors east of Chicago was a fatal defect in the claim for reparations on through shipments to eastern destinations via Chicago.

In reaching that result, the Commission relied upon the authority of *Great Northern Railway Co. v. Sullivan*, 294 U.S. 458 (1935). In that case, a wholesale dealer bought carloads of lignite at mines in Alberta, Canada and sold them to dealers in North Dakota. The shipping was accomplished on combination rates using the Canadian Pacific and Great Northern Railway Companies. The combination rates involved in *Great Northern*, however, differed from those here in that rather than combining independently published local rates, the combination was of proportionals, which were used only to divide the through rate between the participating railroads. The Commission found the American proportionals to be unjust and unreasonable and made no finding about the Canadian proportionals or the overall reasonableness of the combination through rates.

The Supreme Court held that the shipper could not recover damages without showing that the overall combination through rate was unreasonable. Upon the state of the record before the court, it was assumed that the overall rate was, indeed, reasonable.

The unreasonable American proportional did not result in economic injury to the shipper because he made his shipments upon charges which were reasonable in their totality. As we read the *Great Northern* decision, it is simply a recognition of the general principle of law that damages are not recoverable without injury.

That seemed to be the interpretation made by the Commission in deciding *Auburn Mills v. Chicago & A.R. Co.*, 222 I.C.C. 495 (1937). There, the shippers did attack the through charges as excessive; but, their evidence related only to one of the combination rates. The Commission ruled that while the other factors might be shown to be so low that, in combination with the excessive rate, the overall charge would be reasonable, it was the responsibility of the railroads to come forward with the evidence concerning the other factors. The plaintiff here claims that this ruling establishes the

"Auburn presumption" that where one factor is unreasonable and the through rate is challenged, it is presumed that the other factors are reasonable and that the overall charge is, therefore, unreasonable to the same extent as the excessive factor.

A different reading of the *Great Northern* opinion was used by a majority of the Commission in deciding *United States v. Beaumont S.L. & W. RY. Co.*, 301 I.C.C. 231 (1957). The claim for damages was there denied because the shipper showed only the unreasonableness of one factor where the other factor in the through rate was agreed to have been reasonable. The Commission said:

> As was true in *Great Northern Ry. Co. v. Sullivan, supra*, the complainant's only interest here is that the charge for the through movement shall not be unjust or unreasonable. Thus, where reparation is sought, the total rate, and not just one factor of the through rate, must be shown to exceed a maximum reasonable level . . .

United States v. Beaumont S.L. & W. RY. Co., supra, at 234.

While the Auburn case was not mentioned, the dissenting commissioners applied the same principle used there.

The decision now before us denied reparations for shipments terminating east of Chicago upon the view that this result compelled because the plaintiff failed to produce any evidence about the rates east of Chicago. That would appear to be too simplistic an interpretation of *Great Northern*.

To decide this dispute, we need not attempt any definitive interpretation of *Great Northern*. The record before us shows that the plaintiff did sustain economic injury on all of its shipments to the east, regardless of the points of termination. The injury results from the fact that in being required to pay the same rate charges as its competitors located in Greeley, Denver and

Pueblo, the plaintiff was denied any opportunity to use its geographic location as a component in its competitive pricing structure. The record shows that meat is sold by quoted prices in the markets with the shippers absorbing transportation costs.

What is most significant here is that this is a case of relative unreasonableness. The Sterling to Chicago factor is unreasonable in the relationship between the rates thus required to be paid from Sterling and that same charge being made for the other shipping points in the group. What is unreasonable is to ignore the geographical differences. That same relationship applies to any shipment going east of Sterling whether the shipment ends in Chicago or any place east of Chicago. The difference between the plaintiff and the shippers from the other locations is exactly the same. Accordingly, our conclusion is that the denial of the reparations claimed by Sterling Colorado Beef on shipments to points east of Chicago is an error of law by the Commission and must be reversed with a remand to reconsider that claim in light of the views expressed herein.

ORDERED that in 74-A-179, the decision is remanded to the Interstate Commerce Commission for further proceedings in accordance with the views expressed herein and in 74-M-221, insofar as the three-judge court issue is concerned, the decision of the Commission is affirmed.

Dated: August 4th, 1976.

BY THE COURT:

/s/ Robert H. McWilliams
Robert H. McWilliams
United States Circuit Judge

/s/ Alfred A. Arraj
Alfred A. Arraj
United States District Judge

/s/ Richard P. Matsch
Richard P. Matsch
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE STERLING COLORADO BEEF COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN, INC., et al.,

Defendants.

Civil Action No. 74-A-179

THE STERLING COLORADO BEEF COMPANY,

Plaintiff,

v.

BURLINGTON NORTHERN, INC., et al.,

Defendants.

Civil Action No. 74-M-221

JUDGMENT

Pursuant to and in accordance with Memorandum Opinion and Order signed by the Honorable Robert W. McWilliams, the Honorable Alfred A. Arraj and the Honorable Richard P. Matsch on August 4, 1976, it is

ORDERED that in Civil Action 74-A-179, the decision is remanded to the Interstate Commerce Commission for further proceedings in accordance with the views expressed in the said Memorandum Opinion and Order, and in Civil Action 74-M-221, insofar as the three-judge court issue is concerned, the decision of the Commission is affirmed.

Dated at Denver, Colorado, this 17th day of August, 1976.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich, Chief Deputy

APPENDIX B

No. 35021

THE STERLING COLORADO BEEF COMPANY v. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

Decided July 9, 1971

Upon reconsideration, maintenance of assailed rail trailer-on-flatcar rates on fresh meat and meat byproducts, from Sterling, Colo., to Chicago, Ill., found to be an unreasonable practice resulting in unreasonable rates. Assailed rates in other respects found not shown to be unlawful. Prior findings modified, reparation awarded, and appropriate order for the future entered.

Dale C. Dillon, William P. Sullivan, Edwin H. Pewett, Hershel Shanks, and *Thomas G. McGarry* for complainant.

R. J. Schreiber, T. O. Broker, S. R. Brittingham, Jr., J. J. Nagle, J. C. Danielson, G. M. Mariner, W. J. O'Brien, Jr., and *J. J. Burchell* for defendants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS WALRATH, BUSH, AND GRESHAM

BUSH, *Commissioner:*

The modified procedure was followed. By decision and order (not printed) on March 23, 1970, Review Board Number 4 affirmed and adopted the statement of facts, conclusions, and findings of the hearing examiner that the assailed trailer-on-flatcar (TOFC) rates[1] on fresh meat and meat byproducts from Sterling, Colo., to Chicago, Ill., were and are unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act for movements delivered or tendered for delivery on and after July 29, 1966, to the extent such rates ex-

[1]Rates and charges are stated in cents per 100 pounds unless otherwise indicated.

ceeded those sought by the complainant; and that rates of the railroad defendants[2] were unduly and unreasonably preferential of shippers at Greeley, Denver, and Pueblo, Colo., and were unduly and unreasonably prejudicial to complainant at Sterling in violation of section 3(1) of the act. The decision and order also awarded reparations, but on a slightly different basis than that used by the examiner. Upon petitions for reconsideration by the complainant and the defendants, the proceeding was reopened for reconsideration on the present record.

By complaint filed July 29, 1968, it was alleged that the joint rail rates collected by the defendant railroads on an unspecified quantity of TOFC carload shipments of fresh meats and meat byproducts transported from complainant's plant in Sterling to Chicago, as well as to certain eastern destinations beyond Chicago, were unjust and unreasonable, in violation of section 1(5) of the act, and were unduly preferential to complainant's competitors at Greeley, Denver, and Pueblo in violation of section 3(1) of the act. The complainant seeks reparations based on the difference between the rates applies and those requested here on all shipments made during the 2-year period preceding the filing of the instant complaint, as well as shipments *pendente lite.*

Complainant is a purchaser, slaughter, and processor of livestock. It ships meats and meat byproducts from its plant at Sterling to Chicago and eastern destinations beyond via defendants' TOFC rail service. Complainant contends that the assailed rates from Sterling to Chicago are the same as the TOFC rates maintained by defendants from Denver, Greeley, and Pueblo to the same destination, although the distance from Sterling to Chicago is 141 miles shorter than from the three origins unduly preferred. On shipments from Sterling to points east of Chicago rates in the table below apply to Chicago and the local rates apply beyond. Defendants compute freight rates using the Sterling-Chicago rates as part of combination through rates. Complainant further contends that the overall combination rates, using the Sterling rate as a factor, are unjust and unreasonable to the same extent as the factor.[3]

The assailed rates from Sterling to Chicago are shown below:

[2]The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago and North Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Illinois Central Railroad Company; Norfolk and Western Railway Company; and Union Pacific Railroad Company.

[3]Complainant introduced substantial evidence that competition in sales among producers at Chicago and west coast markets is highly intense.

Minimum weight	Basic rate excluding general increases	Rate including Ex Parte No. 256 increase	Rate including Ex Parte No. 259 increase
Pounds	*Cents*	*Cents*	*Cents*
35,000	128	131	135
38,000	122	125	129
70,000	115	118	122
80,000	110	113	116

Complainant maintains that the effect of grouping Sterling with its competitors in the TOFC rates to Chicago denies complainant at Sterling its natural geographic advantage of its relative proximity to that market, and affords its competitors at the other three Colorado points an undue advantage. Complainant compares minimum earnings per car-mile from Sterling to Chicago to various eastern destinations. The comparisons are shown in the table below:

Comparison of revenue returns per car-mile from Sterling
TOFC plan II, minimum 35,000 pounds

To—	Rate[1]	Distance	Return per mile[2]
	Cents	*Miles*	*Cents*
Chicago	135	883	102.48
Albany, N. Y	225	1,872	94.20
Baltimore, Md	220	1,839	93.96
Bangor, Maine	276	2,062	93.70
Boston, Mass	249	1,856	93.90
Bristol, Va	191	1,412	94.68
Connellsville, Pa	187	1,389	94.24
Cumberland, Md	199	1,477	94.32
Elmira, N. Y	205	1,527	93.96
Hagerstown, Md	209	1,546	94.64
Hartford, Conn	240	1,788	94.30
Springfield, Mass	240	1,772	94.02
New Haven, Conn	242	1,804	92.90
Norfolk, Va	239	1,758	95.16
Philadelphia, Pa	228	1,695	94.16
Portland, Maine	259	1,928	94.04
York, Pa	215	1,602	93.94

[1]Including general increases through Ex Parte No. 262.

[2]Computed on the basis of two trailers on one flatcar, each trailer at the minimum weight.

The evidence of record shows that the joint-line TOFC rates applicable from the four named Colorado origins to destinations east of Chicago and to destinations on the west coast are in each instance constructed on, or related to, a mileage basis which accords the lowest rate between the least distant origin and destination, thereby

giving each producing plant its natural geographic advantage of its location and proximity to the competing market. For example, Sterling is 1,856 miles from Boston and is accorded a single-factor through joint rate of 249 cents, while the more distant competitive plants at Denver, Pueblo, and Greeley are accorded rates ranging from 262 to 266 cents. From Sterling to Los Angeles, Calif., the TOFC rate is 159 cents for a distance of 1,283 miles, while from Denver to Los Angeles the rate is 133 cents for the mileage factor of 1,158 miles. Defendants maintain joint-line single-factor TOFC rates from Sterling to many destinations east of Chicago which are related to the docket No. 28300 mileages[4] between all points. Further, comparable rates are published from the competitive Colorado origins to a larger number of eastern destinations based on the same mileage formula which accords each competitive origin point a rate commensurate with its geographic proximity to the destination station.

It is further established of record that prior to the advent of TOFC service, the transportation of these same commodities under refrigerated boxcar rates from competitive producing origins in western trunkline territory to Chicago, as well as to destinations east thereof, were also based on a mileage factor which accorded each producer the geographic benefit of its distance to the market destinations.

It is defendants' position that the TOFC rates from Denver, Greeley, and Pueblo to Chicago were established to meet motor carrier competition, then applied to Sterling under the intermediate rule, where the motor carrier rate to Chicago was and is the same as the motor carrier rate from Denver, Greeley, and Pueblo to Chicago.[5] The establishment of a group basis on the movement of this commodity is not justified from Sterling when rates are established on a *mileage basis* for other points in the Colorado origin area. For example, all of the cattle for the plants at the competitive origins are purchased from the *same* market and drawn from the *same* general area, i.e., northeast Colorado. Labor costs are the *same* for all slaughterhouses in these origins. Evidence was introduced of substantial competition at Sterling and from other competitive points from whence meat is moving into Chicago.

The tables below, compiled from the defendants' evidence, show the development of motor and rail rates in the considered areas:

[4]Unless otherwise indicated, the docket No. 28300 scale are those prescribed in *Class Rate Investigation, 1939*, 262 I.C.C. 447, and later reports, as modified by subsequent general increases.

[5]Complainant's plant was completed at Sterling in April 1966, and there is no evidence that this traffic moved from the origin point to Chicago prior to that date.

Motor carrier commodity rates on fresh meats (in cents per 100 pounds) To Chicago, Ill.[1]

From—	In effect on									
	(A) May 19, 1962		(A) May 30, 1964				(A) July 20, 1966		(B) October 1, 1970	
	Minimum weight		Minimum weight				Minimum weight		Minimum weight	
	25M	25M	25M	30M	35M	38M	35M	38M	35M	38M
Denver, Colo	142	142	142	138	128	122	151	b-145		
Greeley, Colo					a-129					
Pueblo, Colo	c-142	c-142	c-142	---	---	---	151	b-145		
Sterling, Colo	c-142	c-142	c-142	---	---	---	a-151	ab-145		
	---	---	---	ad-138	ad-128	ad-122	e-151	eb-145		

[1]Short-highway distances to Chicago from Denver, Greeley, Pueblo, and Sterling are 1,002, 973, 1,061, and 878 miles, respectively.

a—Maintained in J. B. Montgomery, Inc., MF-I.C.C. No. 2 only.
b—Applicable only on fresh meats, frozen, in boxes.
c—Maintained in RMMTB MF-I.C.C. No. 137 and J. B. Montgomery, Inc., MF-I.C.C. No. 2 only.
d—Rate of this amount was established in RMMTB MF-I.C.C. No. 131, effective November 5, 1966.
e—Maintained in RMMTB MF-I.C.C. No. 171 and J. B. Montgomery, Inc., MF-I.C.C. No. 2 only.
M—Denotes thousands of pounds.

(A)—Item 3400 of RMMTB tariff 2-E, MF-I.C.C. No. 137; J. B. Montgomery, Inc., MF-I.C.C. No. 2; Scott Truck Line, Inc., MF-I.C.C. No. 1.
(B)—Item 3855 of RMMTB tariff 2-F, MF-I.C.C. No. 171; J. B. Montgomery, Inc., MF-I.C.C. No. 2; Scott Truck Line, Inc., MF-I.C.C. No. 1.

Rail plan II TOFC rates on fresh meats (in cents per 100 pounds) from Denver, Greeley, Pueblo, and Sterling, Colo., to Chicago, Ill.[1]

Minimum weight	In effect on		
	(A) August 23, 1959	(B) November 20, 1964	(C) July 20, 1966
Pounds			
25,000	a-129	a-142	b-142
30,000	---	138	138
35,000	---	128	128
38,000	---	122	122
#-70,000	---	115	115
#-80,000	---	110	110

	In effect on						
	(D) July 29, 1968			(E) November 20, 1970			
	Basic rate	X-256 level	X-259-A level	Basic rate	X-259-B level	X-262 level	X-265 level
Pounds							
25,000	b-142	145	149	---	---	---	---
30,000	138	141	145	141	148	157	165
35,000	128	131	135	131	138	146	153
38,000	122	125	129	125	131	139	146
#-70,000	115	118	122	118	124	131	138
#-80,000	110	113	116	113	119	126	132

[1]Short-line distances to Chicago from Sterling, Greeley, Denver, and Pueblo are 883, 982, 1,006, and 1,024 miles, respectively.

a—Applicable only from Denver, Pueblo, and Sterling.
b—Applicable only from Denver and Pueblo.
#—Shipment to be loaded in not more than two trailers.
X-256—Ex Parte No. 256 increase.
X-259-A—Interim Ex Parte No. 259 increase.
X-259-B—Ex Parte No. 259 increase.
X-262—Ex Parte No. 262 increase.
X-265—Interim Ex Parte No. 265 increase, subject to the customary refund provisions.
(A)—Item 3275 of WTLC tariff 445, I.C.C. No. A-4103.
(B)—Item 1410-A of WTLC tariff 445-B, I.C.C. No. A-4525.
(C)—Item 1410-F of WTLC tariff 445-C, I.C.C. No. A-4595.
(D)—Item 5840 of WTLC tariff 445-E, I.C.C. No. A-4700.
(E)—Item 5840 of WTLC tariff 445-F, I.C.C. No. A-4766.

As seen, the assailed TOFC rates from competing origins and Sterling were established at the same level as the already existing motor rates.

The facts of record show that market competition in the meat buying industry is so intensive that even a slight variance in the quoted

price of the commodity, which includes freight charges, is sufficient to cause a loss or a gain of a sale. Furthermore, substantial reliance upon complainant's mileage comparisons from competitive points more distant from Chicago, and upon the fact that the assailed TOFC rates produce substantial car-mile revenues are evidentiary facts entitled to considerable weight.

On petition, defendants question the soundness of the relative reasonableness doctrine referred to in the review board's decision and order. They argue that there is no evidence of relative unreasonableness presented here as found by the review board. We disagree. A rate may be unreasonable in relation to another, or relatively, as a result of comparing the two. A rate likewise may be unreasonable in relation to cost, in relation to a prescribed basis of rates, *or in relation to any other satisfactory standard* which permits us to measure and determine the factual question presented. Broadly, then, it may be said that every unreasonable rate is "relatively unreasonable." Therefore, *all* factors in the evidence of record must be taken into account, and no single one is determinative in establishing the reasonableness or unreasonableness of assailed rates pursuant to section 1(5) of the act. We have considered the intense market competition in the meat industry, mileage comparisons from competitive points more distant from Chicago, car-mile revenues to arrive at our findings, and have given sufficient weight to the substantive evidence presented of the TOFC and motor carrier rate history from Sterling and the other involved points to Chicago. That history shows that the rail single-car rates were established at the *same* level as the motor rates from the competitive points. There is evidence of record, moreover, that these motor rates have moved meat traffic. While it is, however, not within our province to adjust carrier established rates solely to equalize marketing disadvantages growing out of unfavorable business geographical locations, consideration of all of the foregoing factors leads to the finding on reconsideration that it was, and is, an unreasonable practice to charge rates on the traffic described herein from Sterling to Chicago which were and are higher than those set forth in appendix A hereto during the periods there indicated, plus general increases authorized and applicable *pendente lite*, but that the assailed rates otherwise are not shown to have been or to be unlawful.

While complainant attacks the through combination rates over Chicago to points east thereof and alleges a section 3(1) violation, its evidence relates only to the factor to Chicago. Accordingly, we find and conclude that the evidence does not prove that the through rates are otherwise unlawful. *United States* v. *Beaumont, S. L. & W. Ry. Co.*, 301 I.C.C. 231, 234.

On reconsideration, we find that it was and is an unreasonable practice to charge unreasonable rates on the traffic herein described; that the complainant paid and bore the charges at the rates herein found to have been unlawful; and that it is entitled to reparation thereof to the extent of the difference between the charges paid and those which would have accrued at the rates herein prescribed, including shipments moving *pendente lite*, with interest. The complainant should comply with rule 100 of the Commission's General Rules of Practice. The prior findings are so modified. An order for the future will be entered.

COMMISSIONER GRESHAM, dissenting:

I cannot agree that the practice of grouping Sterling with Greeley, Denver, and Pueblo is an unreasonable practice. The motor carrier competition, on a group rate basis, is the dominant factor in this case, to which the majority has failed to give sufficient weight.

It is ordered, That the defendants herein, to the extent that they participate in the transportation be, and they are hereby, notified and required to cease and desist on or before August 30, 1971, and thereafter to abstrain from the violation of section 1 of the Interstate Commerce Act, herein found to exist.

It is further ordered, That the said defendants be, and they are hereby, notified and required to establish on or before August 30, 1971, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the act, and thereafter to maintain and apply rates not exceeding those set forth in appendix A to the report herein, plus subsequently authorized general increases.

And it is further ordered, That this order shall continue in full force and effect until the futher order of the Commission.

APPENDIX A

TOFC rates prescribed on fresh meats and meat byproducts from Sterling, Colo., to Chicago, Ill.,
(in cents per 100 pounds)

Minimum weight	Rate excluding general increases	Rate including Ex Parte No. 256 increase effective date August 19, 1967	Rate including Ex Parte No. 256 and interim 259 increases effective date June 24, 1968	Rate including Ex Parte Nos. 256 and 259 increases effective date November 28, 1968	Rate including Ex Parte Nos. 256, 259, and 262 increases effective date November 18, 1969
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Pounds					
85,000	114	117	121	123	130
88,000	108	111	114	117	124
70,000[1]	101	104	107	109	116
80,000[1]	96	99	102	104	110

[1] Applicable when two trailer loads are tendered.

APPENDIX C

INTERSTATE COMMERCE COMMISSION
Served December 10, 1969

No. 35021

THE STERLING COLORADO BEEF COMPANY

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Assailed rail TOFC rates on fresh meat and meat by-products, from Sterling, Colorado, to Chicago, Illinois, found shown to be unjust and unreasonable, in violation of Section 1(5), and to result in undue preference and prejudice among shippers in violation of Section 3(1) of the act. Basis for lawful rates determined, and reparations awarded. Assailed combination rates on same commodities from Sterling, Colo., via Chicago, Ill., to eastern destinations found not shown to be unlawful.

DALE C. DILLON, WILLIAM P. SULLIVAN, EDWIN H. PEWETT, HERSHEL SHANKS, and THOMAS G. MCGARRY, for complainant.

R. J. SCHREIBER, T. O. BROKER, S. R. BRITTINGHAM, JR., J. J. NAGLE, J. C. DANIELSON, G. M. MARINER, W. J. O'BRIEN, JR., and J. J. BURCHELL, for defendants.

REPORT AND ORDER

RECOMMENDED BY R. J. MITTELBRONN,
HEARING EXAMINER

Commission order dated August 7, 1968, directed the disposition of this matter pursuant to the agency's General Rules of Practice governing modified procedure. The initial and reply pleadings of the parties were ultimately submitted as of February 17, 1969. The record as made was referred to this presiding officer by a Commission (No-Serve) Order dated May 14, 1969.[1] The written testimony and accompanying exhibits are hereby received.

By complaint filed on July 29, 1968, The Sterling Colorado Beef Company alleges that the joint-rail rates and charges applied and collected by the defendant railroads[2] on an unspecified quantity of TOFC carload

[1] *In Reliance Steel Products Co. v. B&O R.R. Co.*, 291 I.C.C. 695, 150 F. Supp. 118, the federal court reversed the Commission's interpretation of the Administrative Procedure Act by holding that *all* provisions of that statute apply to *oral* hearings as well as those conducted under the modified procedure, because the term "hearing" in section 7 of the act included *oral hearing and modified procedure.* Query: "Why does the I.C.C. serve copies of its orders of hearing assignments to all parties in a proceeding involving an oral hearing, yet fails to make such service of orders on the parties when the case is conducted under modified procedure?" A litigant in a case orally heard has an opportunity before and during the hearing to exercise the legal right, accorded by section 7(a) of the APA, to file an affidavit with the Agency to disqualify the assigned hearing officer on grounds of bias and prejudice, etc. Since the orders of assignment in Modified Procedures cases are not served upon the parties, a litigant lacks any knowledge of which hearing officer is factually assigned to dispose of the case *until after* his decision is served. Does such agency practice of assigning modified procedure cases by internal, no-serve orders constitute violations of Section 5 of the A.P.A. as well as contravene the decision of the federal court in the *Reliance Steel Co.* case, *supra*?

[2] The Atchison, Topeka and Santa Fe Railroad Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Illinois Central Railroad Company, Norfolk and Western Railway Company, and Union Pacific Railroad Company.

shipments of fresh meats and meat by-products moving from its plant in Sterling, Colo., to Chicago, Ill., as well as to eastern destinations beyond Chicago, are unjust and unreasonable, in violation of section 1(5) of the act, and further are unduly preferential to complainant's competitors at Greeley, Denver, and Pueblo, Colo., in violation of section 3(1) of the act. The alleged unlawfulness is only directed against the joint-rail rates from Sterling to Chicago, Ill., *and not* to the combination rate factor applicable beyond Chicago to shipments destined to eastern points. No issues are raised involving the eastern railroads' rates hence there was no necessity for naming all said carriers defendants herein. Reparations are sought based on the difference between the rates applied and those requested herein on all shipments made during the two-year period preceding the filing of the instant complaint, as well as shipments *pendente lite.* Complaint paid and bore the freight charges on each shipment involved.

The gravamen of the complaint is simply illustrated in the following uncontested facts:

In the conduct of its business the complainant Colorado Corporation engages in the purchase, slaughter, and processing of livestock. It ships fresh meats, edible meat by-products, and inedible by-products in truckload lots via the defendants' TOFC service from its plant *at Sterling* to markets in the Chicago, Ill., area, as well as to eastern destinations beyond Chicago. Ninety-five percent of the company's gross income is realized from the sale of whole dressed carcass beef. The importance of having a just and reasonable level of rail rates available for the transportation of its products to Chicago and to eastern destinations beyond is reflected by the fact that 15 percent of complainant's total carcass beef production is sold in the highly competitive Chicago market, while 65 percent is sold to customers east of Chicago, primarily in the states of New York and New Jersey. The assailed TOFC rates to Chicago are used as a component in making combination rates to points east thereof.

Since the dressed carcass beef is sold on a delivered basis, the freight charges are included in quoted prices. Because the quality of meat is objectively controlled through inspection and grading by the U. S. Department of Agriculture, *delivered price* is the sole factor in a buyer's selection of a slaughterer. As illustrated in complainant's pleadings, the Chicago delivered market price is the key for determining prices in the eastern markets, since the latter represents the Chicago price plus freight charges beyond. Competition in sales among producers is so intensive that a variance of ⅛ of a cent per pound, the equivalent of 12½ cents per hundredweight, is sufficient to win or lose a buyer. The same competition exists for customers in the West Coast Markets.

In the eastern markets, including Chicago, the complainant vies for sales with competitors' plants located at Greeley, Denver, and Pueblo, Colo., each of which also employs defendants' TOFC service for the transportation of their shipments. From the compared rates of record, together with rates and mileages extracted from tariffs cited by the parties in their pleadings, representative comparative mileage and rate tables have been prepared of the existing assailed TOFC rates from Sterling, Colo., to Chicago, Ill., to East Coast as well as West Coast destinations, with rates maintained by defendants from the named competitive Colorado origin plants to the same destination areas. Said comparative rate tables are set forth in the attached Appendix A, incorporated herein by reference.

Analyzing rate comparisons in Appendix A, it is observed that the joint-line TOFC rates applicable from the four named Colorado origins to destinations east of Chicago, and to destinations on the West Coast, are in each instance constructed on, or related to, a mileage basis factor which accords the lowest rate between the least distant origin and destination, thereby giving to each producing plant the natural geographic advantage of its location and proximity to the competing market. For example, Sterling, Colo., the site of complainant's

plant is 1,856 miles from Boston and is accorded a single factor through joint-rate of 249¢ while the more distant competitive plants at Denver, Pueblo, and Greeley are accorded rates ranging from 262¢ to 266¢. Again, from complainant's Sterling plant to Los Angeles, Calif., the TOFC rate is 159¢ against a distance factor of 1,283 miles, while from Denver to Los Angeles the rate is 133¢ against the mileage factor of 1,158 miles.

As further illustrated in the more comprehensive comparative rate tables tendered by complainant's witness Wilson, the defendants maintain joint-line single factor TOFC rates from Sterling to many destinations east of Chicago which are directly and reasonably related to the Docket 28300 mileages between all points. An inspection of the same rail tariff verifies that comparable rates are published from the competitive Colorado origins to a larger number of eastern destinations based on the same mileage factor formula which accords each competitive origin point a rate commensurate with its geographic proximity to the destination station. The complainant has not raised any legal issue over the refusal of the eastern railroads to enter into concurrences with western trunkline railroads and establish joint TOFC rates from Sterling to the same eastern destinations as now apply from competitive Colorado origins.[3]

The record further establishes that prior to the advent of TOFC service the transportation of these same commodities under refrigerated boxcar rates from competitive producing origins in western trunkline territory to Chicago, as well as to destinations east of Chicago, were also based on a mileage factor which accorded each producer the geographic benefit of its distance to the common market destinations.

Contrary to the historical rate structure with refrigerated boxcar service, and contrary to the TOFC rate structure from western trunkline producing origins in Colorado to West Coast destinations, as well as to all

[3] Refer witness Wilson's Exhibit No. 4, page 3.

destinations east of Chicago, the defendants herein have established and presently maintain TOFC rates on the same commodities from the complainant's plant at Sterling to Chicago, Ill., and from the competitive producing origins at Denver, Greeley, and Pueblo to Chicago, which are identical in cents per hundred pounds irrespective of the fact that Sterling is 141 miles closer to Chicago than the competitor at Pueblo.

The effect of grouping Sterling with its competitors in the TOFC rates to Chicago accords said competitors an undue advantage and opportunity to participate in the Chicago common market, and denies to complainant at Sterling its natural geographic advantage of substantial proximity to said market. The railroads failed to accord the complainant at Sterling any such group rate parity on the same commodities with its competitors when marketing its products on the West Coast. On the contrary, the Denver producer, 1,158 miles from Los Angeles, is accorded the rate of 133¢ while the Sterling plant, 1,283 miles from Los Angeles, has a rate of 159¢—a 26 cents per 100 pounds rate disadvantage. As established by the evidence submitted, a variance of 12½ cents per hundredweight is sufficient to lose a buyer's business. With a 26 cents rate disadvantage, complainant at best sells 10 percent of its total production in the West Coast market by absorbing the cost of additional freight charges.[4]

A considerable portion of the verified statements by witnesses for both parties is devoted to arguments concerning the rate basis that was promised to the complainant by the Union Pacific Railroad, as origin carrier, if the complainant corporation built its slaughter and meat processing plant at Sterling, Colo. The evidence shows that efforts were made by the originating carrier with the WTL Rate Committee to obtain approval of a rate structure from Sterling to Chicago which would accord to the Sterling producer a rate reflecting its

[4] Refer verified statement of witness Wilson, pp. 3 through 6.

geographical proximity to the Chicago market. Those efforts were unsuccessful. The Union Pacific Railroad failed to take any independent action in publishing such rates, as requested by and promised to the complainant. Suffice it to say that such arguments based on promises are tantamount to so much "Who struck John?" An oral or written promise to establish any given rate is worthless if the rate to be established violates any provision of the Interstate Commerce Act. Similarly if a rate complained of is shown to be unlawful, the fact that a carrier agrees to publish a substitute rate is equally immaterial; the Commission decides and orders the lawful rate to be established.

The two principal justifications for defendants maintaining a parity of rates from the four producing points in Colorado to Chicago are (1) to meet the identical grouping of rates established by the motor carriers from those origins to Chicago, and (2) if TOFC rates based on a mileage factor were established from Sterling to Chicago, as sought by complainant, defendants might be required to establish and maintain similar mileage related rates from other western trunkline origins to other Illinois points, an act which would result in an alleged loss of substantial revenues to the carriers. In this connection, the carriers have failed to furnish substantial evidence to prove that the level of rates sought by complainant are noncompensatory or unreasonably low in comparison with rates on the same traffic between points in the same Docket 28300 territory; neither have defendants attempted to prove through any traffic studies what amount of revenue losses they allege will occur if the rates sought by complainant are established under a Commission order herein. Defendants alone are in possession of all such factual evidence.

On the other hand, the detailed testimony of complainant's witness Wilson, with accompanying exhibits, demonstrates that the basis of TOFC rates sought will produce substantial car-mile revenues to defendants for the transportation services rendered. Neither carrier competition nor possible decreases in carriers' revenues

can ever justify the maintenance of rates which are unjust and unreasonable and which cause undue preference and prejudice among shippers. In brief, there can be no factual justification for violation of the law.

Attention is directed to the present car-mile revenues accruing to the defendants under the existing rates from the four Colorado producing origins to Chicago. The present TOFC rate of 135¢, which is equally applicable from Sterling, Greeley, Denver, and Pueblo, and which is subject to a published tariff minimum weight of 35,000 pounds (one trailer), produces car-mile revenues to the defendants of 53.51 cents on complainant's traffic. The same rate produces to the carriers car-mile revenues of 48.16 cents, 46.97 cents, and 46.14 cents on traffic from the competitive origins of Greeley, Denver, and Pueblo, respectively. A final comparison reveals that the rate of 116 cents minimum 80,000 pounds (two trailers) accords the defendant car-mile revenues of 105.10 cents on the traffic to Chicago which originates at Sterling, while the same group rate on the same commodities to Chicago provides the defendants with car-mile revenues of 94.50 cents, 92.25 cents, and 90.63 cents from Greeley, Denver, and Pueblo, respectively. (Refer to Appendix A)

In further contrast to the assailed rates, it is observed that rail carriers maintain a joint TOFC rate on the same commodities from Chicago to Boston, Mass., of 156 cents, subject to a minimum weight of 30,000 pounds (single trailer) which produces a revenue of 48.09 cents per car-mile, in comparison to a rate from Chicago to New York of 150 cents, same minimum, which produces a revenue of 50.55 cents per car-mile. It can be observed that each of these rates gives recognition to the fact that the Docket 28300 mileage distance from Chicago to Boston is 973 miles versus that to New York of 890 miles.

The typical rate comparisons set forth on page 2 of Appendix A again reflect that the defendant carriers, in conjunction with the eastern railroads, have voluntarily established and maintained for a considerable number of years, TOFC rates on the same commodities from the same western trunkline origin points to eastern destinations which are based on the Docket 28300 mileage factor, and which consequently accord to each producing origin the natural advantages flowing from its geographic proximity to the destination market. These TOFC rates which are applicable to the numerous points throughout official territory are published in western trunklines Tariff 4550-D I.S.S. A-4609. The formula employed by the railroads for computing these through joint rates from WTL origins to points in official territory is: Rate per hundred pounds = 90 cents x I.C.C. Docket 28300 mileage divided by 700. The 90 cents factor in the formula represents car-mile revenue for transporting two trailers on a flatcar over a distance of a single mile (45 cents per trailer). When this factor is multiplied by the Docket 28300 between any specific origin and destination point, the resultant product represents the total car-mile revenues for the entire distance. The divisor factor of 700 represents the combined minimum hundredweight units of two trailers (35,000 pound minimum per trailer).

The foregoing formula for computing TOFC rates on the same traffic from and to points within the same Docket 28300 territory, which formula was devised and voluntarily established and maintained by the carriers for a number of years, is shown to produce rates and substantial car-mile revenues to the railroads which can be deemed just and reasonable by any standard or norm of measurement. This factual observation is apparent from the comparative rate and car-mile revenue tables set forth on page 2 of Appendix A. From said tables it can be observed that in all instances the present car-mile revenues accruing to the railroads on traffic moving from each of the Colorado origins to destinations east of Chicago exceed the 45 cents per car-mile figure

on a single trailer (minimum weight 35,000 pounds) embodied in the rate-mileage formula devised and approved by the carriers.

Even more significant are the car-mile revenues produced by rates subject to the 70,000 pounds minimum (two trailers per flat car) under the same formula. On traffic emanating from the Sterling plant to the eastern destinations shown, the revenues range from 94.28 cents to 114.93 cents per car-mile. To the same destinations, the railroad approved mileage formula rates produce revenues from 94.21 cents to 94.62 cents per car-mile on traffic originating from Denver. With the single exception of traffic destined to Cincinnati, Ohio, the present rail rates produce revenues in excess of 94 cents per car-mile on all traffic originating at the Greeley and Pueblo, Colo., plants. These rates derived from the railroad approved mileage formula produce average revenues which exceed the 90 cents per car-mile factor embodied in the same rate formula.

Aside from their remunerative nature, the outstanding feature of this railroad formulated rate structure on this traffic from WTL origins to destinations east of Chicago is the reasonable relationship between the rates which are determined by the distance factor from each origin to each destination. This scheme of rate making accords to each shipper the benefit of its geographic proximity to the destination markets. The same equitable principle of rate making is embodied in the rates applied on the same traffic from the same Colorado origins to west coast destinations, the result of which is to give the producers at Denver the 26 cents per 100 pounds rate advantage over complainant at Sterling, due to the former's 125 miles geographic proximity to the destination market. But, the present rate parity granted complainant's competitors at Greeley, Denver, and Pueblo, on all traffic to Chicago denies the Sterling producer all rate benefit of its geographic location and 141 miles greater proximity to the Chicago market. The best test of reasonableness of an assailed rate is its comparison with rates voluntarily established

on the same commodity between points in the same general territory. Application of the rail approved mileage formula for computing just and reasonable rates from Sterling, Colo., to Chicago is, in fact, all that the complainant herein requests. The resultant TOFC rates on complainant's traffic moving out of Sterling, Colo., to Chicago are set forth on page 3, Appendix A.

As can be observed from said rate table, the sought rates not only achieve defendants' primary objective of meeting intermodal motor carrier competition, as portrayed in defendants' witness Parish verified statement and exhibits, but will produce substantial car-mile revenues on the Colorado-Illinois traffic, which are in all instances reasonably related to the existing rates and car-mile revenues on the same TOFC traffic from the same and other western trunkline origins to destinations in the states of New York, Maine, Massachusetts, Connecticut, Pennsylvania, Maryland, Tennessee, and Virginia.[5]

Summary, Findings, and Order

The efforts expended by the Union Pacific Railroad Company, as originating carrier of this traffic, to establish TOFC rates sought by complainant were not successful. The refusal of the defendant railroads to establish TOFC rates based on the mileage formula which they voluntarily employed for the establishment and continued maintenance of rates on the identical traffic from the same origins to other destinations within the same general territory constitutes an unreasonable and unjust practice which results in the maintenance of the assailed rates which are shown to be "relatively high" and therefore unjust and unreasonable, in violation of section 1(5) of the act. The evidence of record further demonstrates that the maintenance of the assailed TOFC

[5] Refer WTL tariff 450-D I.C.C. A-4609, and illustrations excerpted from witness Wilson's testimony and statistical exhibits, but adjusted to include Ex Parte general increases, page 2 of Appendix A.

rate parity from the named Colorado origins to Chicago, found shown to be unlawful on complainant's traffic, results in unduly prejudicing complainant by denying it the natural geographic advantage, rate-wise, due to its proximity to the Chicago market and granting to complainant's competitors undue preferential rate treatment by according them an equality of rates with the complainant to Chicago, even though said competitors' producing origins are as much as 100 to 141 miles more distant from the common markets in the Chicago area.

To conform with the provisions of section 1(5) of the act, rates from and to points within the same territory must not only be held to a maximum reasonable level, but they must also be "relatively" reasonable in comparison of one to the other, even if the yield in revenues derived therefrom fails to cover the carriers cost for performing the transportation services. Refer Docket No. 33105, *Port of New York Authority, et al., v. Aberdeen and Rock Fish Railroad Co., et al.*, (1964) 321 I.C.C. 738, 746 and cases cited therein. Similarly, just because rates produce revenues which exceed the rail carriers full costs for performing the services rendered does not mean they exceed a maximum reasonable level. Refer *American Colloid Co. v. Akron C.&Y.R. Co.*, 321, I.C.C. 91,109. In the instant case the railroad approved formula for establishing rates on the involved commodities between points within the Docket 28300 territory are shown to result in revenues which range from 46.4 cents to 47.5 cents per car-mile for a single trailer, subject to a minimum of 35,000 pounds, and from 92.9 cents to 95.16 cents per car-mile for two trailers per freight car subject to a minimum of 70,000 pounds per car. Comparably high, yet reasonable and related, car-mile revenues result from the sought rates subject to the 80,000 pounds minimum weight per car. (Refer Appendix A)

The presiding officer is compelled to find that the assailed TOFC rates from Sterling, Colo., to Chicago, Ill., on the involved traffic results from the failure of defendants to maintain a rate structure based on the

mileage formula that defendants voluntarily approved and employed to establish rates on the identical commodities from the same origin to other destination points within Docket 28300 territory; that this failure, or refusal on the part of defendant railroads constitutes an unjust and unreasonable practice, resulting in the maintenance of the assailed TOFC rates which are shown herein to be "relatively high," and, therefore, unjust and unreasonable.

Further, on traffic from Sterling, the assailed rate structure deprives the complainant of the benefit of its geographic location and proximity to the consuming markets, and simultaneously affords an undue advantage to competitiors located at more distant Colorado origins. Where the competition for sales among the producers is so keen that the difference of a fraction of a cent in a delivered price quotation can win or lose a customer, and when the delivered price quoted is determined solely by the applicable transportation charges, the assailed rate structure, which is wholly unrelated to distance, inevitably results in undue prejudice to complainant and undue preference to its competitors. Section 3(1) of the act requires that lawful rates bear some logical relationship to the mileage between the competing producing origin points and the common destination marketing area. The evidence available compels a statutory finding that the assailed TOFC group rate from Sterling, Colo., to Chicago, Ill., violates section 3(1) of the act and that such statutory violation can only be remedied by establishing just and reasonable rates based upon the same railroad approved mileage formula which was employed to voluntarily establish rates from the same origin area to Docket 28300 destination areas east of Chicago. A citation of the voluminous I.C.C. case law on this basic principle would be superfluous.

Complainant indulges in a bit of double talk by explicitly stating that its allegations of unlawfulness are directed solely against the TOFC rate from Sterling to Chicago and simultaneously requesting reparations on its traffic moving from Sterling to eastern destinations

based on the new through combination rate from Sterling via Chicago, which through rate embodies the lower factor up to Chicago approved herein. Since 65% of complainant's shipments are shown by its evidence to move to destinations east of Chicago, defendant railroads accurately point out at page 17 *et seq.* of their brief that complainant is factually condemning the through combination TOFC rate and resultant charges on shipments made via Chicago, but is directing all of its evidence against the Sterling to Chicago factor of the through combination rate.

Defendants have accurately set forth the applicable legal principle that reparations may be awarded only where the *total* rate is assailed and total charges are shown to be unreasonable, and not where the attack is directed solely against a particular factor or segment of the through rate, or against a practice employed in determining a rate, without regard to the total charges resulting from the rate so determined. Evidence relating to but one factor of a combination rate is not sufficient to prove that the through rate is unreasonable. *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, *United States v. Beaumont, S.L.&W. Ry. Co.*, 301 I.C.C. 231, 234.

Defendants are further correct in their factual assertion that complainant has failed to submit probative evidence to support a finding that the total freight charges collected on the combination rates over Chicago are shown to be unreasonable. No award of reparations, therefore, can be granted on these shipments. To the contrary, complainant's witness Wilson's comparisons of the through total charges collected on representative shipments from Sterling destined to points east of Chicago, and based on the combination rate over Chicago, clearly establish that the combination rate and resultant through charges are lower than the freight charges that would accrue to defendants from the single factor joint-line rail TOFC rates from Sterling to the same destinations, which rates are based on the approved rail distance formula. The award of reparations

granted to complainant herein is, therefore, limited to shipments originating in Sterling, Colo., and terminated in Chicago, Ill.

Complainant is entitled to reparations on past and continuing shipments made during the time period encompassed by the instant complaint and measured by the difference in the assailed rates herein found to violate section 1(5) of the act and the sought rates approved herein. Lack of documentary evidence covering each TOFC shipment involved precludes a computation of the total damages due the complainant. Parties, therefore, will comply with Rule 100 of the Commission's General Rules of Practice.

IT IS ORDERED:

(1) That within 45 days after the effective date thereof, the defendant railroads, be and are hereby required to, cancel the tariff schedules containing TOFC rates applicable on fresh meats and meat by-products which are found herein to be unlawful, and to establish, and hereafter maintain, through publication of, new schedules, TOFC rates on the named commodities from Sterling, Colo., to Chicago, Ill., determined under the mileage and car-mile revenue formula heretofore approved, adopted, and applied by defendant carriers to establish TOFC rates on the same traffic from the same and other W.T.L. origin points to destinations in Docket 38300 territory.

(2) That within 45 days after the effective date hereof, the defendants carriers, through the Union Pacific Railroad Co., as the originating line of the each shipment involved, pay to complainant, The Sterling Colorado Beef Company, of Sterling, Colo. reparations, computed pursuant to Rule 100 of the Commission's General Rules of Practice, and measured by the difference between freight charges collected on each shipment under the assailed rates herein found unlawful, and the TOFC rates determined under the railroads approved formula discussed in this report and referred to in (1) *supra*; and,

(3) That this order shall become effective 30 days after date of service unless stayed by the Commission or by the timely filing of exceptions thereto.

Dated at Washington, D. C. this 23rd day of October, 1969.

By the Commission, R. J. Mittelbronn, Hearing Examiner.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX A
COMPARISONS OF PRESENT TOFC RATES
APPLICABLE ON FRESH MEATS AND MEAT PRODUCTS
SUBJECT TO VARYING MINIMA

Docket No.35021

To Chicago From	Miles	Rate (Min.Wgt.) 35,000 lbs.	Revenue In Cents Per Mile	Rate (Min.Wgt.) 38,000 lbs.	Revenue In Cents Per Mile	70,000 lbs. (2 Trailers)	80,000 lbs (2 Trailers)
Sterling	883	128¢ (A)	- 50.73	122¢ (A)	- 52.50	115¢ (A) - 91.16	110¢ (A) - 99.66
Greeley	982	"	- 45.62	"	- 47.20	" - 81.97	" - 89.61
Denver	1,006	"	- 44.53	"	- 46.08	" - 80.01	" - 87.47
Pueblo	1,024	"	- 43.75	"	- 45.27	" - 78.61	" - 85.93
Sterling	883	135¢ (B)	- 53.51	129¢ (B)	- 55.51	122¢ (B) - 96.72	116¢ (B) -105.10
Greeley	982	"	- 48.16	"	- 49.92	" - 86.97	" - 94.50
Denver	1,006	"	- 46.97	"	- 48.73	" - 84.89	" - 92.25
Pueblo	1,024	"	- 46.14	"	- 47.87	" - 83.40	" - 90.63

From Chicago To		(Min. Wgt.) 30,000 lbs.	
Boston, Mass.	973	156¢ (B)	- 48.09
New York	890	150¢ (B)	- 50.55

To Los Angeles, Calif. From		(Min. Wgt.) 38,000 lbs.
Sterling	1,283	159¢ (B) - 47.07
Denver	1,158	133¢ (B) - 43.55

(A) Basic Rates
(B) Rates at Ex Parte 259 Level

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COMPARISON OF JOINT RAIL TOFC RATES 1/

Minimum 35,000 Pounds

From: Competitive Colorado Origins To: Chicago, Ill.
Versus Representative Destinations East of Chicago 2/

Docket No. 3502
Appendix A

	Colorado Origins											
Destination	Sterling	Miles	Revenue in Cents Per Mile	Denver	Miles	Revenue in Cents Per Mile	Greley	Miles	Revenue in Cents Per Mile	Pueblo	Miles	Revenue in Cents Per Mile
Chicago	135	883	53.51	135	1006	44.53	135	982	45.62	135	1024	43.75
Albany, N.Y.	225	1672	47.10	240	1790	46.93	238	1771	47.04	242	1803	46.98
Boston, Mass.	249	1856	46.95	265	1974	46.99	262	1955	46.91	266	1987	46.85
Bristol-Va/Tenn.	191	1412	47.34	202	1504	47.01	203	1511	47.02	197	1465	47.06
Elmira, N.Y. 3/	205	1527	46.98	222	1647	47.18	218	1626	46.92	222	1660	46.81
Jersey City,N.J.	238	1771	47.03	253	1887	46.93	250	1870	46.79	251	1876	46.83
New Haven,Conn.	242	1804	46.45	258	1992	46.98	255	1903	46.90	260	1935	47.03
Norfolk, Va.	236	1758	46.98	250	1865	46.92	249	1857	46.93	247	1842	45.60
Philadelphia,Pa.	228	1695	47.08	243	1811	46.96	241	1794	47.02	241	1800	46.86
Portland, Me.	259	1928	47.02	274	2046	46.87	272	2027	46.97	276	2059	46.92
Minimum 70,000 Pounds												
Buffalo, N.Y.	186	1381*	94.28	202	1499	94.33	199	1480	94.12	203	1512	93.98
Charleston, W.Va.	176	1072*	114.93	191	1413	94.62	190	1404	94.73	187	1390	94.17
Cincinnati,Ohio	149	1102*	94.65	163	1209	94.38	162	1273	89.08	160	1263	88.68
Cleveland,Ohio	164	1214	94.56	179	1330	94.25	177	1313	94.36	180	1335	94.38
Detroit,Mich.	156	1158*	94.96	171	1270	94.25	169	1249	94.72	173	1282	94.46
Pittsburgh, Pa.	180	1335*	94.38	196	1434	94.56	193	1434	94.21	194	1440	94.31

* Rates from Sterling to these destinations not in effect. Rates approved by Western Trunk Line Carriers May 22, 1968, however, Eastern railroads have not concurred therein.

1/ Include all Ex Parte general increases.
2/ Rates determined by mileage formula voluntarily devised and approved by railroads.
3/ Applicable to 9 terminals in New Jersey-New York area.

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BEST COPY AVAILABLE

TOFC Rates Sought
From
Sterling, Colorado to Chicago, Illinois

Docket No. 35021
Appendix A

Minimum Weight	Basic Rate Excluding General Increases (Cents Per Hundredweight)	Basic Rate Including Ex Parte 256 Increase (Cents Per Hundredweight)	Basic Rate Including Ex Parte 259 Increase (Cents Per Hundredweight)	Revenue In Cents Per Mile
35,000 lbs.	115	117	121	47.96
38,000 lb .	108	111	115	49.49
70,000 lbs. 1/	101	104	108	85.61
80,000 lbs. 1/	96	99	102	92.41

1/ Applicable when two trailer loads are tendered.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE STERLING COLORADO BEEF COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Defendants

BURLINGTON NORTHERN INC., et al.,

Intervening Defendants.

Civil Action No. 74-A-179
74-M-221

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Burlington Northern Inc., Chicago and North Western Transportation Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Illinois Central Gulf Railroad Company, Norfolk and Western Railway Company, and the Union Pacific Railroad Company, intervening defendants herein, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in this action insofar as it remands to the Interstate Commerce Commission the Commission decision in I.C.C. Docket 35021, entered in this action on the 17th day of August, 1976.

This appeal is taken pursuant to Sections 1253 and 2101 of the Judicial Code, 28 U.S.C., Sections 1253 and 2101.

/s/ Richard J. Schreiber
Richard J. Schreiber
Counsel for Intervening Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE STERLING COLORADO BEEF COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN, INC., et al.,

Defendants.

Civil Action No. 74-A-179

THE STERLING COLORADO BEEF COMPANY,

Plaintiff,

v.

BURLINGTON NORTHERN, INC., et al.,

Defendants.

Civil Action No. 74-M-221

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Interstate Commerce Commission, defendant herein, hereby appeals to the Supreme Court of the United States from the Memorandum Opinion and Order filed August 4, 1976, and

Judgment filed August 17, 1976, insofar as it remands the proceedings in Interstate Commerce Commission Docket No. 35021.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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CERTIFICATE OF SERVICE

I hereby certify that on this, the fourteenth day of October, 1976, I served true and accurate copies of the foregoing Notice of Appeal to the Supreme Court of the United States on counsel for all parties of record by first-class or airmail, postage prepaid, in the following manner:

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Supreme Court, U. S.
FILED
DEC 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-672

BURLINGTON NORTHERN INC., et al., *Appellants*,

v.

STERLING COLORADO BEEF COMPANY, *Appellee*.

On Appeal from the United States District Court for the District of Colorado

MOTION TO AFFIRM

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STATUTE:

49 U.S.C. 1(5) 2

IN THE

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OCTOBER TERM, 1976

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BURLINGTON NORTHERN INC., et al., *Appellants*,

v.

STERLING COLORADO BEEF COMPANY, *Appellee*.

On Appeal from the United States District Court for the District of Colorado

---

MOTION TO AFFIRM

Appellee moves the Court to affirm the judgment below on the ground that the question presented is so unsubstantial as to require no further argument.

QUESTION PRESENTED

Whether the decision of the court below is in conflict with the decision of this Court in *Great Northern Railway Co.* v. *Sullivan*, 294 U.S. 458 (1935).

STATEMENT OF THE CASE

This case began when appellee, The Sterling Colorado Beef Company ("Sterling"), filed a complaint with the Interstate Commerce Commission alleging that as to certain shipments to Chicago and points east, the appellant railroads had been charging Sterling unreasonably high rates in violation of, *inter alia,* section 1(5) of the Interstate Commerce Act. The gravamen of Sterling's complaint was that on rates to Chicago (which were also used on eastern shipments) the railroads had grouped Sterling with—that is, charged Sterling the same rate as—Sterling's more distant competitors located at Denver, Pueblo and Greeley, Colorado. The Commission ruled that this grouping of Sterling with its more distant competitors was, as alleged, unreasonable and ordered the railroads to publish Chicago rates for Sterling at a level 14 and 15 cents per cwt. below the rates charged to Sterling's more distant competitors. The Commission also ordered the railroads to pay Sterling reparations consisting of the difference between the illegal rate which had been charged and the legal rate that should have been charged, the latter as determined by the Commission in fixing Sterling's rate for future shipments. The Commission, however, limited its reparations order to shipments which terminated in Chicago, even though the illegal rate had also been used on east coast shipments as one factor in a so-called combination rate. This combination rate was simply the sum of (i) the illegal Chicago rate, and (ii) the local rate from Chicago to the east coast destination.

Sterling had argued before the Commission that the combination rate was necessarily unreasonable to the same extent as the Chicago rate, which the Commission had found to be unreasonably high. The Commission rejected this argument on the ground that Sterling's "evidence relates only to the factor to Chicago" rather than to the overall rate from Sterling to the destination (339 I.C.C. at 537). In support of this ruling, the Commission summarily cited its own decision in *United States* v. *Beaumont, S.L. & W. Ry. Co.,* 301 I.C.C. 231, 234 (1957), which, in turn, had relied exclusively on this Court's ruling in *Great Northern Railway Co.* v. *Sullivan,* 294 U.S. 458 (1935).

Sterling appealed this aspect of the decision to the district court, arguing that the Commission had misread *Great Northern* and reached an insupportable result. The district court agreed. This appeal followed.

ARGUMENT

The district court's decision is plainly correct. The *Great Northern* case involved rail shipments of lignite from Canadian mines to American markets. The shipments moved on a combination rate which was composed of two so-called proportional rates, one proportional being applicable to the Canadian part of the journey and the other proportional being applicable to the American part of the journey.[1] The plaintiff established that the American proportional (*i.e.,* the rate

[1] A proportional rate is a factor in a combination rate. However, a proportional rate may be used only as part of a combination rate—that is, on a shipment that moves beyond on the through rate. The combination rate assailed in this case did not consist of proportional rates, but of "local" rates—i.e., rates that, like proportional rates, may be used as part of a combination rate, but, unlike proportional rates, can be used independently of any trans-shipment. See *Central Vermont Railway, Inc.* v. *United States,* 182 F.Supp. 516, 518, n. 4 (D. Vt. 1960), *rev'd on other grounds,* 366 U.S. 272 (1961).

from the international boundary to American destinations) was unreasonable, but neither alleged nor sought to prove that the overall rate from origin to destination was unlawful. The shipper made no such claim with respect to the overall through rate because affirmative evidence in the case showed that the overall through rate was in fact reasonable. This was because the Canadian proportional was so depressed as to more than make up for the excess charge on the American proportional.[2] In these circumstances, the Commission made no finding with respect to the legality of the overall combination through rate.

[2] The evidence before the Commission showed that the rate on the Canadian proportional was much lower than the rate fixed by the Commission itself as reasonable on the American proportional, so much so that the overall rate was clearly reasonable. The Commission-approved rates for the American proportional are set forth in a table in the I.C.C. ruling in the case, *sub nom., Alberta Coal Sales Co.* v. *C. N. Rys.*, 142 I.C.C. 543, 547 (1928). These Commission-mandated rates are based on mileage, and the table contains prescribed rates for distances from 10 to 500 miles. By way of example, we may consider a shipment from the coal mines in Alberta (Canada) to a point 500 miles beyond the American border. The average distance from Alberta mines to the international boundary is 728 miles, and the average rate for this Canadian proportional was $3.70 (142 I.C.C. at 544). A reasonable rate from the American border to an American destination 500 miles from the border (228 miles less than the distance under the Canadian proportional) is, according to the I.C.C.'s findings, $3.95 (142 I.C.C. at 547). Thus, the rate on the Canadian proportional ($3.70 for 728 miles) was very significantly below the rate on the American proportional ($3.95 for 500 miles). In short, the Canadian rate was less for a much greater distance. It was, therefore, clear that the Canadian railroads published such low rates to the American border that, when combined with the rates south of the border, they produced reasonable through rates, even though rates south of the border, standing alone, had been unreasonable. Thus, said the Supreme Court, "here the [overall rates] were not excessive" (294 U.S. at 462).

Plaintiff nevertheless argued that it was entitled to reparations simply on the basis that the American proportional was unreasonably high, even though the overall through rate was reasonable. This Court disagreed, holding that the ultimate issue was the reasonableness of the overall rate, not simply of the American proportional. In rejecting the shipper's claim for reparations, the Supreme Court stated:

> [The shippers] *did not attack the combination* or allege aught against the Canadian Pacific proportional . . . [The Commission] made no finding concerning the reasonableness of the Canadian proportionals *or of the combination through rates. There being no claim or finding to the contrary, the charges collected on these shipments must be deemed to have been just and reasonable* [emphasis supplied] [294 U.S. at 461].

The Court went on to note that there was affirmative evidence to show that the combination rate as a whole was reasonable:

> Indeed, dissenting commissioners without opposition on the part of others, state that they [the overall charges collected on these shipments] are affirmatively shown to be reasonable [*Id.*].

The holding of the case is simply a rejection of the shipper's position, which the Court summarized as follows:

> Plaintiff seeks to recover the difference between the proportional established by the defendant and that found by the commission to be just and reasonable *notwithstanding its fuel was hauled from mines to the competitive field for a just and reasonable charge* [emphasis added] [294 U.S. at 463].

Great Northern simply held that in order to collect reparations, a shipper must allege and prove that the overall combination rate (when composed of two proportionals) is unreasonable. But the court clearly left open the question at issue here: whether, in an appropriate case, an assailed combination rate may be proved unreasonable by evidence directed toward one factor.[3]

The Commission interpreted the *Great Northern* decision in two subsequent cases. In the first (*Auburn Mills* v. *Chicago & A. R. Co.*, 222 I.C.C. 495 (1937)), the Commission awarded reparations on the basis of evidence relating to only one of the factors used in the construction of the combination rate. The shipper argued, as Sterling did here, that the overall through rate was necessarily unlawful to the same extent as the unlawful factor. The railroads, relying on *Great Northern*, argued that a combination through rate could never be shown to be unlawful by means of evidence directed only to one factor. The Commission, in *Auburn*, set forth the railroads' contention as follows:

> Defendants urge that complainants, by confining their evidence largely to the factors from the gateways, have failed to show the combinations unreasonable. They cite *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458, . . . [222 I.C.C. at 496].

[3] The Commission itself had answered this question in the affirmative in a case decided shortly before the *Great Northern* decision. *Alabama Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 204 I.C.C. 195 (1934), *aff'd in pertinent part and modified in other respects*, 213 I.C.C. 226 (1935). However, the Commission did not discuss this case in its opinion here.

In *Auburn*, the Commission rejected this misplaced reliance on *Great Northern* and awarded reparations.[4]

In a second case (*United States* v. *Beaumont S. L. & W. Ry. Co.*, 301 I.C.C. 231 (1957)), the Commission, apparently unaware of its decision in *Auburn*, adopted the reading of *Great Northern* which it had rejected in *Auburn;* namely, that evidence relating to one factor can never establish the illegality of an overall through rate. It was this interpretation of *Great Northern* which the Commission adopted in the instant case (again without citing *Auburn*).

The district court held that the Commission's ruling was based on "too simplistic an interpretation of *Great Northern*. . ." (App. 4a). The district court stated:

> "The Supreme Court [in *Great Northern*] held that the shipper could not recover damages without showing that the overall combination through rate was unreasonable. Upon the state of the record before the court, it was assumed that the overall rate was, indeed, reasonable.
>
> "The unreasonable American proportional did not result in economic injury to the shipper because

[4] In *Auburn*, the Commission stated:

> In *Great Northern R. Co.* v. *Sullivan, supra*, the Supreme Court held that an award of reparation based on a finding by the Commission that a proportional rate for that part of the transportation from the international border to destination was unjust and unreasonable cannot be sustained in the absence of a claim or finding that the through rate was unreasonable. Only the proportional rate from the international border was there assailed. *The court pointed out that complainants did not attack the combination*, or the Canadian Pacific proportional applying up to the border as a part of the through charge. It held that, there being *no claim or finding* to the contrary, the through charges collected on the shipments must be deemed to have been just and reasonable. [emphasis supplied] [222 I.C.C. at 497].

> he made his shipments upon charges which were reasonable in their totality. As we read the *Great Northern* decision, it is simply a recognition of the general principle of law that damages are not recoverable without injury" [App. 3a].

But, clearly, *Great Northern* did not hold that evidence relating to one factor could *never* establish the illegality of an overall through rate. That holding could not have been made in *Great Northern* because the plaintiff did not even allege that the overall through rate was unreasonable. For that reason, the district court here found it unnecessary to undertake a definitive interpretation of *Great Northern* (App. 4a). It decided only that *Great Northern* was inapplicable.

The district court's conclusion that in this case the illegality of the combination rate has been proved by the illegality of the western factor is unassailable. Here, the unlawful grouping of origins on the Chicago rate necessarily carried over into the combination rate. Unlike the situation in *Great Northern,* a depressed eastern factor could not make up for the excess charged on the western factor, for the railroads obviously did not and could not charge Sterling and its more distant competitors a different rate on the portion of the journey from Chicago to the east coast destination. The railroads had to charge the same on the eastern factor regardless of whether a shipment originated in Sterling or Denver. That being so, the overall combination rate grouped origins unlawfully to the same extent as the western factor. As the district court stated with unassailable logic:

> "To decide this dispute, we need not attempt any definitive interpretation of *Great Northern*. The record before us shows that the plaintiff did sustain economic injury on all of its shipments to the east, regardless of the points of termination. The injury results from the fact that in being required to pay the same rate charges as its competitors located in Greeley, Denver and Pueblo, the plaintiff was denied any opportunity to use its geographic location as a component in its competitive pricing structure. The record shows that meat is sold by quoted prices in the markets with the shippers absorbing transportation costs.
>
> "What is most significant here is that this is a case of relative unreasonableness. The Sterling to Chicago factor is unreasonable in the relationship between the rates thus required to be paid from Sterling and that same charge being made for the other shipping points in the group. What is unreasonable is to ignore the geographic differences. *That same relationship applies to any shipment going east of Sterling whether the shipment ends in Chicago or any place east of Chicago.* The difference between the plaintiff and the shippers from the other locations is exactly the same. Accordingly, our conclusion is that the denial of the reparations claimed by Sterling Colorado Beef on shipments to points east of Chicago is an error of law by the Commission and must be reversed with a remand to reconsider that claim in light of the views expressed herein" (App. 4a-5a) (emphasis supplied).

There is no merit to the railroads' contention that the district court's ruling "is squarely at odds with over sixty years of consistent interpretation of the interstate Commerce Act by the Commission regarding the evidentiary standard necessary to support reparation awards" (Jurisdictional Statement, p. 8). Little need be said beyond citing the *Auburn* case and pointing out that in denying reparations in *Great Northern,*

this Court *reversed* the Commission.[5] Other cases in which the Commission has found a combination rate unreasonable—and awarded reparations—on the basis of evidence directed toward only one factor are *C. W. Zaring & Co.* v. *Florida East Coast Railway Co.*, 153 I.C.C. 647 (1929), *Alabama Grocery Co.* v. *Atchison, T & S. F. Ry. Co.*, 204 I.C.C. 195 (1934), *aff'd in pertinent part and modified in other respects*, 213 I.C.C. 226 (1935), and *Marblehead Lime Co.* v. *St. Louis—S.F. Ry. Co.*, 253 I.C.C. 67 (1942). Indeed, aside from Commission cases which misinterpret *Great Northern*, prior Commission decisions support the district court's ruling.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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[5] Appellants have mis-cited the cases contained in footnote 7 of the Jurisdictional Statement. *C. W. Zaring & Co.* v. *Florida East Coast Railway Co.*, 153 I.C.C. 647 (1929), actually supports Sterling's position, for there the Commission awarded reparations after finding a combination rate unreasonable based on evidence directed toward one factor. In *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917) and in *Fraser-Smith* v. *Grand Trunk Western Ry. Co.*, 185 I.C.C. 57 (1932), the Commission merely held that before reparation may be awarded for combination rate shipments, the total rate must be assailed. Like *Great Northern*, these cases made no ruling as to whether evidence directed to one factor may prove a combination rate unlawful.

No. 76-672

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1976

BURLINGTON NORTHERN, INC., ET AL., APPELLANTS

v.

STERLING COLORADO BEEF COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS

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STERLING COLORADO BEEF COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS

Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed.

STATEMENT

This is a direct appeal from that part of a final judgment of a three-judge district court (J.S. App. 1a-7a) which set aside an order of the Interstate Commerce Commission insofar as it denied Sterling Colorado Beef Company's complaint for reparations against the appellant railroads.[1] The reparations complaint had alleged that rail rates on certain trailer-on-flatcar (TOFC) shipments

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[1]The district court judgment also affirmed a different Commission order with respect to a new schedule of trailer-on-flatcar rates from the West to the East. That portion of the district court judgment is also before this Court on appeal in *Sterling Colorado Beef Company* v. *United States, et al.*, No. 76-757.

of fresh meat and meat byproducts from Sterling's Colorado plant to Chicago and points in various eastern States were unjust and unreasonable, in violation of 49 U.S.C. 1(5), and were unduly preferential to Sterling's competitiors at Greeley, Denver, and Pueblo, Colorado, in violation of 49 U.S.C. 3(1). An administrative law judge found that the Sterling to Chicago rates were unlawful, in violation of 49 U.S.C. 1(5) and 3(1), but that the record contained probative evidence that the rates east of Chicago were not unlawful (J.S. App. 18a-33a). A Commission review board affirmed with only minor modifications.

On reconsideration, the Commission upheld the earlier reports and awarded reparations with respect to the Sterling to Chicago charges (J.S. App. 8a-17a). The Commission specifically limited its opinion to the reasonableness of the rates west of Chicago, and affirmed prior findings that Sterling had failed to introduce probative evidence on the lawfulness of the rates to points east of Chicago (J.S. App. 15a).

Sterling then filed in the United States District Court for the District of Colorado an action to set aside the Commission's order. It invoked the court's jurisdiction under 28 U.S.C. (Supp. V) 1336(a), which provides that the district courts shall have jurisdiction of any civil action "to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures." Sterling also filed in the same court an action to set aside an order of the Commission entered in a different proceeding (hereinafter the "rate case") which also involved eastbound TOFC rates (see note 1, *supra*). A three-judge court was convened in the rate case pursuant to 28 U.S.C. (1970 ed.) 2325, and the present reparation case was consolidated with the rate case for hearing and disposition.

The three-judge court reversed the Commission's decision in the reparations case and remanded the case for reconsideration of the reparations issue (J.S. App. 1a-7a). Although the Commission had denied reparations for shipments terminating east of Chicago on the ground that Sterling failed to produce evidence concerning the rates for the east-of-Chicago segment of such transportation, the court found that Sterling "did sustain economic injury on all of its shipments to the east, regardless of the points of termination" (J.S. App. 4a). The district court also ruled that the Commission had unreasonably ignored the geographical facts of the case and failed to take into account the competitive relationships of the shippers (J.S. App. 5a).

ARGUMENT

This Court lacks jurisdiction of this appeal. Under 28 U.S.C. 1253, a party may appeal to this Court from an order granting or denying an injunction in a civil action "required by any Act of Congress to be heard and determined by a district court of three judges." Although this case was heard and determined by a district court of three judges, no Act of Congress *required* a three-judge district court.

This reparations case involved an effort to set aside an order of the Commission "for the payment of money" (28 U.S.C. (Supp. V) 1336(a)). *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 203, 205. The former provisions of Title 28 that required the convening of a three-judge court in actions to set aside orders of the Interstate Commerce Commission, 28 U.S.C. (1970 ed.) 2321-2325, were expressly inapplicable to orders "for the payment of money." 28 U.S.C. (1970 ed.) 2321.[2]

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[2]Under Pub. L. 93-584, 88 Stat. 1917, 1918, certain actions filed on or after March 1, 1975, to review orders of the Interstate Commerce Commission must be brought in the courts of appeals. 28 U.S.C.

Thus, as this Court held in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 441, "judicial review of an order denying reparations does not require a three-judge court." In *Perez* v. *Ledesma*, 401 U.S. 82, 87, this Court held that "[e]ven where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them" (footnote omitted). It follows that an appeal from the district court's judgment in this case lies exclusively in the court of appeals, not in this Court. See *Ringsby Truck Lines, Inc.* v. *United States*, 490 F. 2d 620 (C.A. 10), certiorari denied *sub nom. Ringsby Truck Lines, Inc.* v. *National Small Shipments Traffic Conference, Inc.*, 419 U.S. 833; cf. *Moody* v. *Flowers*, 387 U.S. 97.

Since the time to appeal to the court of appeals has expired and appellants have not, to our knowledge, filed a protective notice of appeal to the court of appeals, this Court may wish to remand the case to the district court "so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals." *Pennsylvania Public Utility Commission* v. *Pennsylvania R. Co.*, 382 U.S. 281, 282. See *Moody* v. *Flowers, supra*, 387 U.S. at 104; *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens*, 397 U.S. 820.

(Supp. V) 2321, 2342. Review of orders "for the payment of money," however, remains within the exclusive jurisdiction of the district courts. 28 U.S.C. (Supp. V) 1336(a). Sterling Colorado Beef Company's district court complaint was filed before March 1, 1975.

CONCLUSION

The appeal should be dismissed or, alternatively, the judgment should be vacated and the case remanded to the district court for the entry of a fresh decree.

Respectfully submitted.

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v.

STERLING COLORADO BEEF COMPANY, *Appellee.*

On Appeal from the United States District Court for the District of Colorado

RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

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RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

The Government has moved to dismiss the railroads' appeal on the ground that this Court lacks jurisdiction; the railroads should have appealed, says the Government, to the Tenth Circuit, citing *United States* v. *Interstate Commerce Commission,* 337 U.S. 426.

The railroads are, of course, delighted with this because a dismissal, if accompanied by an order to the district court to enter a fresh decree, would give the railroads another bite at the apple—this time in the

Tenth Circuit, and would, even if they lose there, delay the final day of reckoning. (The Interstate Commerce Commission requires payment of interest on reparations at an annual rate of 4%.)

Sterling's position is as follows:

1. Under *United States* v. *Interstate Commerce Commission, supra,* it is clear that the railroads should have appealed to the Tenth Circuit.

2. We believe that there is an area in which a three-judge court should have jurisdiction to decide one-judge issues, which issues should then be appealable to this Court. See, *e.g., Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73; *Paul* v. *United States,* 371 U.S. 245; *Zemel* v. *Rusk,* 381 U.S. 1; *Flast* v. *Cohen,* 392 U.S. 83; *Doe* v. *Lukhard,* 493 F.2d 54 (4th Cir. 1974); *Federal Power Commission* v. *Corporation Commission of Oklahoma,* 354 F. Supp. 137 (W.D. Okla. 1973). In this case there were clearly some issues appropriate for disposition by a three-judge court (see *Sterling Colorado Beef Company* v. *U.S., et al.* No. 76-757), and on this basis, this Court would have jurisdiction to review the one-judge issue.

3. But even if this Court decides that it is without jurisdiction of this appeal, it should in no event remand the case to the district court for entry of a fresh decree to enable appellants to notice a timely appeal to the Tenth Circuit:

A. The practice of remanding a case erroneously appealed to this Court for the entry of a fresh decree by the district court arose only in those cases where there was a legal uncertainty facing the appealing party as to where he should appeal. See *Phillips* v.

United States, 312 U.S. 246, 254, in which the Court remanded for entry of a fresh decree "where the question of jurisdiction was not obviously settled by prior decisions." The Court there cited an earlier Supreme Court decision in which it had stated:

> We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under section 266 been more definitely settled at the time the appeal to the Court was attempted. [*Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U.S. 386, 392].

Here, however, there was no uncertainty. *United States* v. *Interstate Commerce Commission, supra,* makes it clear that the railroads should have proceeded to the Tenth Circuit.

Moreover, most of the cases which have followed this procedure of remanding for entry of a fresh decree have been either civil rights cases where the human rights at stake might be thought to outweigh procedural niceties [*Perez* v. *Ledesma,* 401 U.S. 82; *Moody* v. *Flowers,* 387 U.S. 97], or involved questions of broad public interest and importance. *Wilentz* v. *Sovereign Camp, Woodmen of the World,* 306 U.S. 573; *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens,* 397 U.S. 821.

By contrast, the one-judge issue here is a purely private fight, involving only money, and the railroads are represented by sophisticated and highly competent counsel.

B. The railroads cannot even claim excusable neglect in failing to file a protective notice of appeal to

the Tenth Circuit. The Government, which was a defendant below, in order to protect its own appellate rights, filed a notice of appeal in this case *to the Tenth Circuit,* as well as to this Court. (The Government subsequently withdrew these notices of appeal.) The railroads apparently chose not to.

Moreover, the railroads were alerted at the very outset of this litigation of potential dangers in three-judge issues versus one-judge issues. Sterling filed two complaints, a one-judge complaint and a three-judge complaint (as well as a motion to consolidate) to ensure that there would be no problem with the district court's decision on this account.

C. Finally, we would question the legality of this Court's practice of remanding for entry of a fresh decree in order to reinvest a court of appeals with jurisdiction after expiration of a jurisdictional time limit. Regardless of the equities or the reasons for failure to file timely, this Court would not remand a case for entry of a fresh decree in order to give a litigant a new opportunity to file a petition for certiorari after the expiration of the statutory time in which to do so. Neither would a court of appeals remand to a district court for entry of a fresh decree in order to allow a litigant to appeal beyond the expiration of the time fixed for filing a notice of appeal to a court of appeals. Courts have generally regarded themselves as without power or authority to extend these time periods, either directly or indirectly. *Allegrucci* v. *United States,* 372 U.S. 954; *Department of Banking* v. *Pink,* 317 U.S. 264; *Berman* v. *United States,* 378 U.S. 530; *United States* v. *Robinson,* 361 U.S. 220; *Burnside* v. *Eastern Airlines, Inc.,* 519 F.2d 1127 (5th Cir. 1975); *Marten* v. *Hess,* 176 F.2d 834 (6th Cir. 1949). Yet, in effect, in the present situation an extension would be granted (if a fresh decree were entered) even though the railroads cannot even claim excusable neglect.

Another analogy which may be of interest to the Court arises in connection with interlocutory appeals under 28 U.S.C. 1292(b). There a petition for permission to appeal must be filed within ten days of the district court's order containing the prescribed 1292(b) statement. It has been held that the district court is without power, after the expiration of the ten-day period, to re-enter its order for the sole purpose of permitting a timely appeal. *Hanson* v. *Hunt Oil Co.,* 488 F.2d 70 (8th Cir. 1973); *Woods* v. *Baltimore & Ohio R.R.,* 441 F.2d 407 (6th Cir. 1971); *Nakhleh* v. *Chemical Construction Corp.,* 366 F. Supp. 1221 (S.D.N.Y. 1973).

These analogies make it clear that there is an inconsistency which this Court has never faced. But, in any event, the railroads have not brought themselves within the rationale of the *Phillips* case and the *Oklahoma Gas* case. Unlike the situation in those cases, *United States* v. *Interstate Commerce Commission, supra,* made it clear that the railroads should have appealed to the Tenth Circuit. The railroads cannot now complain if they are required to face the consequences of their having failed to do so.

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